


ESTTA Tracking number: **ESTTA317905**

Filing date: **11/19/2009**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91187204
Party	Defendant Tim Bernardy
Correspondence Address	TIM BERNARDY P.O. BOX 3395 NEWPORT BEACH, CA 92659-8395 UNITED STATES timbernardy@aol.com
Submission	Motion to Dismiss 2.132
Filer's Name	Brian P. Kinder
Filer's e-mail	bkinder@hkclaw.com
Signature	/Brian P. Kinder/
Date	11/19/2009
Attachments	Motion to Dismiss for Failure to Prosecute.pdf (1 page)(35119 bytes) Declaration of Brian Kinder.pdf (20 pages)(493184 bytes) Declaration of Tim Bernardy.pdf (1 page)(32855 bytes) POS.pdf (1 page)(46903 bytes)

I hereby certify that this paper or fee is being electronically filed with the United States Patent and Trademark Office on 11/19, 2009.


Brian P. Kinder

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Application Serial No. 77/314393
For the Mark BAUHAUS CLOTHING
Published in the *Official Gazette* on September 30, 2008

NATHANIEL CHRISTIAN,

Opposer

v.

Opposition No.: 91187204

TIM BERNARDY,

Applicant.

**APPLICANT'S MOTION TO DISMISS OPPOSITION FOR
FAILURE TO PROSECUTE PURSUANT TO RULE 2.132(a) / TBMP 534**

Applicant Tim Bernardy ("Applicant") hereby moves to dismiss the above-captioned opposition proceedings for failure to prosecute pursuant to TBMP 534 and 37 CFR 2.132(a) because Opposer Nathaniel Christian failed to take any testimony or offer any other evidence during the 30-day testimony period, which ended October 3, 2009. See Declaration of Brian P. Kinder filed concurrently herewith.

Respectfully submitted,

Dated: November 19, 2009

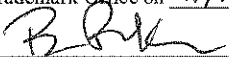
HART, KING & COLDREN

By:



Brian P. Kinder
David Christopher Baker
200 Sandpointe, Fourth Floor
Santa Ana, California 92707
(T) 714.432.8700
(E) bkinder@hkclaw.com
Attorneys for Applicant Tim Bernardy

I hereby certify that this paper or fee is being electronically filed with the United States Patent and Trademark Office on 11/19, 2009.


Brian P. Kinder

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Application Serial No. 77/314393
For the Mark BAUHAUS CLOTHING
Published in the *Official Gazette* on September 30, 2008

NATHANIEL CHRISTIAN,

Opposer

v.

TIM BERNARDY,

Applicant.

Opposition No.: 91187204

DECLARATION OF BRIAN P. KINDER

I, Brian P. Kinder, declare:

1. I am a duly licensed attorney and an associate with the law firm of Hart, King & Coldren, attorney of record for Applicant Tim Bernardy ("Applicant"). The facts set forth herein are true of my own personal knowledge and if called as a witness, I could and would competently testify thereto.

2. In or around the early part of this year, I placed a phone call to counsel for Petitioner Raymond J. Dowd and left a message requesting that counsel for the parties participate in the Initial Discovery Conference.

3. Receiving no return call, in or around May 2009, I placed two (possibly three) phone calls to counsel for Petitioner Raymond J. Dowd and left messages requesting that counsel for the parties participate in the Initial

Discovery Conference. I received no return phone call to any of these messages.

4. On or about May 29, 2009, I called yet again and this time spoke with counsel for Petitioner Raymond J. Dowd and requested that counsel for the parties participate in the Initial Discovery Conference. Mr. Dowd indicated to me that he was busy preparing in another matter and that he would therefore call me back on Monday, June 1, 2009 to discuss.

5. Following my conversation with Mr. Dowd on May 29, 2009, I transmitted an email to Mr. Dowd confirming our conversation. A true and correct copy of my May 29, 2009 confirming email to Mr. Dowd is attached hereto as Exhibit A.

6. I did not receive a call back from Mr. Dowd for the entire week of June 1, 2009. Therefore, on the morning of Friday, June 5, 2009, I sent another email to Mr. Dowd asking him when I could expect to receive his call. A true and correct copy of my June 5, 2009 email to Mr. Dowd is attached hereto as Exhibit B.

7. Receiving no phone call or response from Mr. Dowd, on the afternoon of Monday, June 8, 2009, I prepared and transmitted a letter to Mr. Dowd via email and regular U.S. mail. A true and correct copy of my June 8, 2009 letter and email to Mr. Dowd is attached hereto as Exhibit C. In my letter, I informed Mr. Dowd that if I did not hear back from him or his client by June 12, 2009, I would have little option other than filing a motion to dismiss for failure to prosecute.

8. On June 12, 2009, I received an email from Ms. Catlin Meade who identified herself as Mr. Dowd's assistant. She stated in her email to me that Mr. Dowd was out of the country and that he would be returning June 16, 2009. She indicated that Mr. Dowd would contact me when he returned. A true and correct

copy of the June 12, 2009 email to me from Ms. Meade is attached hereto as Exhibit D.

9. In response to Ms. Meade's email, I prepared and sent a reply email correspondence to Ms. Meade, copying Mr. Dowd, and asked that Mr. Dowd contact me urgently upon his return. I asked that he do so before June 18, 2009. A true and correct copy of my June 18, 2009 email is attached hereto as Exhibit E.

10. On the afternoon of June 18, 2009, Mr. Dowd called me and we spoke briefly. My immediate impression was that he was not prepared to participate in the Initial Discovery Conference therefore I informed him of the need to participate in the Initial Discovery Conference. Mr. Dowd apologized for the delays up to that time and acknowledged that his client needed to prepare a discovery plan and provide initial disclosures. He then inquired about the potential for the parties to co-exist in the marketplace and stated that he would discuss this with his client and get back to me. He expressed his belief that things sometimes work out when you get both parties on the phone for a settlement discussion. He indicated that he would call me back shortly and possibly with a proposal along these lines.

11. After receiving no return phone call, I then attempted to reach Mr. Dowd via telephone call one or two times over the course of the next sixty days. Each time I called, I was told that Mr. Dowd was not available.

12. On August 27, 2009, I transmitted an email to Mr. Dowd and his assistant Ms. Meade stating that the matter has not moved forward and that his client's pretrial disclosure period had passed. I asked that he advise me as to whether he was still in contact with his client. I also inquired as to whether there was any reason why I should not file a motion to dismiss for failure to prosecute. A true and correct copy of my August 27, 2009 email to Mr. Dowd and his

assistant Ms. Meade is attached hereto as Exhibit F.

13. At no time during the pendency of these proceedings has Petitioner taken any affirmative steps to prosecute the claims asserted herein. Specifically, Petitioner has failed to participate in the Initial Discovery Conference, failed to serve any discovery, failed to participate in any meaningful settlement discussions, failed to provide pretrial disclosures, and failed to present any testimony during the testimony period.

14. In or around November 2009, I began preparing to file a motion to dismiss for failure to prosecute, as well as a motion for terminating sanctions, or in the alternative a motion for judgment on the pleadings, or in the alternative a motion to extend discovery deadlines. In doing so, I visited the TTAB website to confirm the proceeding number for document caption purposes. I discovered at that time that the Petitioner case had filed a Motion to Extend and represented to the Board that he had attempted to obtain Applicant's consent. At no time have I received any communication from Petitioner requesting such consent.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed November 19, 2009, in Santa Ana, California.



Brian P. Kinder

EXHIBIT A

Brian P. Kinder

From: Brian P. Kinder
Sent: Friday, May 29, 2009 2:16 PM
To: rdowd@dunnington.com
Subject: Bauhaus

Mr. Dowd:

Thank you for taking my follow up call today re the above matter.

Per our conversation, you indicated that you would call me back on Monday, June 1, 2009. My schedule is fairly open Monday other than a conference call from 2 to 3:30 pm my time (I am 3 hours behind you here in California). Please call at any time that is convenient on your end.

I look forward to hearing from you then and provide my contact information in the signature block below.

Regards,
Brian P. Kinder
Hart, King & Coldren PLC
200 E. Sandpointe, 4th Floor
Santa Ana, California 92707
Phone: (714) 432-8700 x 336
Fax: (714) 546-7457
bkinder@hkclaw.com
www.hkclaw.com

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EXHIBIT B

Brian P. Kinder

From: Brian P. Kinder
Sent: Friday, June 05, 2009 11:03 AM
To: rdowd@dunnington.com
Subject: RE: Bauhaus
Mr. Dowd:

I did not hear back from you on Monday.

Please let me know when I can expect to receive a call back.

Thanks.

Regards,
Brian P. Kinder
Hart, King & Coldren PLC
200 E. Sandpointe, 4th Floor
Santa Ana, California 92707
Phone: (714) 432-8700 x 336
Fax: (714) 546-7457
bkinder@hkclaw.com
www.hkclaw.com

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From: Brian P. Kinder
Sent: Fri 5/29/2009 2:15 PM
To: rdowd@dunnington.com
Subject: Bauhaus

Mr. Dowd:

Thank you for taking my follow up call today re the above matter.

Per our conversation, you indicated that you would call me back on Monday, June 1, 2009. My schedule is fairly open Monday other than a conference call from 2 to 3:30 pm my time (I am 3 hours behind you here in California). Please call at any time that is convenient on your end.

I look forward to hearing from you then and provide my contact information in the signature block below.

Regards,
Brian P. Kinder
Hart, King & Coldren PLC
200 E. Sandpointe, 4th Floor

11/19/2009

Santa Ana, California 92707
Phone: (714) 432-8700 x 336
Fax: (714) 546-7457
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EXHIBIT C

HK&C

HART, KING & COLDREN

Brian P. Kinder
bkinder@hkclaw.com

June 8, 2009

Our File Number: 38143.001/4834-0191-4371v.1

VIA 1st CLASS MAIL AND E-MAIL

rdowd@dunninton.com

Raymond J. Dowd, Esq.
DUNNINGTON, BARTHOLOW & MILLER, LLP
1359 Broadway, Suite 600
New York, New York 10018

Re: U.S. Trademark Opposition
BAUHAUS CLOTHING
Opposition No.: 91/187,204

Dear Mr. Dowd:

I have made several attempts to contact you to discuss the above referenced matter. After calling your office several times and leaving you messages, I finally spoke with you on the phone when I called your office again on May 29, 2009. When we briefly spoke that day, you indicated that you were busy at the time and would call me back on Monday, June 1, 2009. I sent a confirming e-mail to you the same day that included all of my contact information.

After I did not receive a return call from you the entire week of June 1, 2009, I sent a follow up email to you on Friday, June 5, 2009 requesting that you contact me. It is now Monday, June 8, 2009 and I still have not heard back from you.

Please contact me at your earliest possibility to discuss the above matter. If I do not hear back from you by the end of the week, i.e. **June 12, 2009**, I will have no choice but to presume that your client is no longer interested in pursuing the opposition to my client's application and will move the Board for an order dismissing the above opposition for failure to prosecute.

Thank you.

Very truly yours,

HART, KING & COLDREN



Brian P. Kinder

Brian P. Kinder

From: Brian P. Kinder
Sent: Monday, June 08, 2009 4:04 PM
To: rdowd@dunnington.com
Subject: Bauhaus

Attachments: LETTER TO DOWD 6-8-09.pdf

Mr. Dowd:

Letter attached.

Original via U.S. mail.

Regards,
Brian P. Kinder
Hart, King & Coldren PLC
200 E. Sandpointe, 4th Floor
Santa Ana, California 92707
Phone: (714) 432-8700 x 336



LETTER TO DOWD
6-8-09.pdf (35 ...

F x: (714) 546-7457
bkinder@hkclaw.com
www.hkclaw.com

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EXHIBIT D

Brian P. Kinder

From: Catlin Meade [cmeade@dunnington.com]
Sent: Friday, June 12, 2009 11:14 AM
To: Brian P. Kinder
Cc: Raymond Dowd
Subject: Bauhaus Trademark Litigation.

Dear Mr. Kinder,

I am Raymond Dowd's assistant. We represent Nathaniel Christian in the TTAB litigation number 91187204. I am writing in response to your letter of June 8, 2009. Mr. Dowd is currently out of the country on another matter and is due back on June 16, 2009, at which point he will contact you to discuss the pending TTAB litigation. We appreciate your patience.

Please confirm receipt of this e-mail and do not hesitate to contact me with any questions.

Respectfully yours,
Catlin Meade

Catlin M. Meade
Paralegal
Dunnington, Bartholow & Miller LLP
1359 Broadway, Suite 600
New York, NY 10018
Tel: (212) 682-8811
Fax: (212) 661-7769
email: cmeade@dunnington.com

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To ensure our compliance with requirements imposed by the IRS, we inform you that any U.S. tax advice contained in this document cannot be used for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter that is contained in this document. Despite the Confidentiality Note above, there is no limitation on disclosure by the intended recipient of the tax treatment or tax structure of the transaction that is the subject of the written advice.

EXHIBIT E

Brian P. Kinder

From: Brian P. Kinder
Sent: Friday, June 12, 2009 3:37 PM
To: Catlin Meade
Cc: Raymond Dowd
Subject: RE: Bauhaus Trademark Litigation.

Dear Ms. Meade:

Thank you for the email acknowledgement.

I will wait to hear back from Mr. Dowd upon his return. Please convey to Mr. Dowd my request that he contact me on an urgent basis. I have been attempting to get in touch with him for many weeks now. The Trademark Trial and Appeal Board issued an order long ago requiring that the parties meet and confer on discovery issues. Thusfar, I have received no cooperation from Mr. Dowd in this regard. As you will no doubt appreciate, I am therefore compelled to document this in the event the Trademark Trial and Appeal Board takes issue with the lateness of our meet and confer efforts.

In view of your email acknowledgment, I will extend the deadline to hear back from Mr. Dowd to June 18, 2009. As indicated in my earlier letter, if I do not hear back from Mr. Dowd by that date, I will again have little option but to file a motion to dismiss the opposition for failure to prosecute.

Thank you.

Regards,
Brian P. Kinder
Hart, King & Coldren PLC
200 E. Sandpointe, 4th Floor
Santa Ana, California 92707
Phone: (714) 432-8700 x 336
Fax: (714) 546-7457
bkinder@hkclaw.com
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From: Catlin Meade [mailto:cmeade@dunnington.com]
Sent: Friday, June 12, 2009 11:14 AM
To: Brian P. Kinder
Cc: Raymond Dowd
Subject: Bauhaus Trademark Litigation.

Dear Mr. Kinder,

11/19/2009

I am Raymond Dowd's assistant. We represent Nathaniel Christian in the TTAB litigation number 91187204. I am writing in response to your letter of June 8, 2009. Mr. Dowd is currently out of the country on another matter and is due back on June 16, 2009, at which point he will contact you to discuss the pending TTAB litigation. We appreciate your patience.

Please confirm receipt of this e-mail and do not hesitate to contact me with any questions.

Respectfully yours,
Catlin Meade

Catlin M. Meade
Paralegal
Dunnington, Bartholow & Miller LLP
1359 Broadway, Suite 600
New York, NY 10018
Tel: (212) 682-8811
Fax: (212) 661-7769
email: cmeade@dunnington.com

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EXHIBIT F

Brian P. Kinder

From: Brian P. Kinder
Sent: Thursday, August 27, 2009 12:29 PM
To: Catlin Meade
Cc: Raymond Dowd
Subject: RE: Bauhaus Trademark Litigation.

Dear Ms. Meade:

Can you please have Mr. Dowd contact me at his earliest convenience. This matter has not moved forward, his client's discovery period has closed, and his client's pretrial disclosure period has passed. If you are no longer in contact with your client, please advise.

I would like to know if there is any reason why I should not file a motion to dismiss for failure to prosecute?

I look forward to hearing from you.

Regards,
Brian P. Kinder
Hart, King & Coldren PLC
200 E. Sandpointe, 4th Floor
Santa Ana, California 92707
Phone: (714) 432-8700 x 336
Fax: (714) 546-7457
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From: Catlin Meade [mailto:cmeade@dunnington.com]
Sent: Friday, June 12, 2009 11:14 AM
To: Brian P. Kinder
Cc: Raymond Dowd
Subject: Bauhaus Trademark Litigation.

Dear Mr. Kinder,

I am Raymond Dowd's assistant. We represent Nathaniel Christian in the TTAB litigation number 91187204. I am writing in response to your letter of June 8, 2009. Mr. Dowd is currently out of the country on another matter and is due back on June 16, 2009, at which point he will contact you to discuss the pending TTAB litigation. We appreciate your patience.

Please confirm receipt of this e-mail and do not hesitate to contact me with any questions.

11/19/2009

Respectfully yours,
Catlin Meade


Catlin M. Meade
Paralegal
Dunnington, Bartholow & Miller LLP
1359 Broadway, Suite 600
New York, NY 10018
Tel: (212) 682-8811
Fax: (212) 661-7769
email: cmeade@dunnington.com

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I hereby certify that this paper or fee is being electronically filed with the United States Patent and Trademark Office on 11/19/09, 2009.


Brian P. Kinder

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Application Serial No. 77/314393
For the Mark BAUHAUS CLOTHING
Published in the *Official Gazette* on September 30, 2008

NATHANIEL CHRISTIAN,

Opposer

v.

TIM BERNARDY,

Applicant.

Opposition No.: 91187204

DECLARATION OF APPLICANT TIM BERNARDY

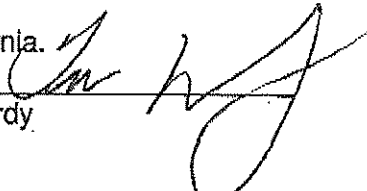
I, Tim Bernardy, declare:

1. I am the Applicant in the above-captioned proceedings. The facts set forth herein are true of my own personal knowledge and if called as a witness, I could and would competently testify thereto.

2. I am informed that Mr. Christian filed a Motion to Extend and represented to the Board that he had attempted to obtain Applicant's consent. At no time have I received any communication from Mr. Christian requesting such consent, including, without limitation, telephone calls, written correspondences, facsimiles, electronic mails, or the like.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 18, 2009, in COMPTON, California.


Tim Bernardy

PROOF OF SERVICE

STATE OF CALIFORNIA)
COUNTY OF ORANGE)


I am employed in the County of Orange, State of California. I am over the age of 18 years and am not a party to the within action. My business address is 200 Sandpointe, Fourth Floor, Santa Ana, California 92707-0507. On the date of execution referenced below, I caused document(s) described as 1) **OPPOSITION TO MOTION TO EXTEND**, 2) **MOTION TO DISMISS FOR FAILURE TO PROSECUTE**, and 3) **DECLARATION OF BRIAN P. KINDER**, to be served on the interested parties in this action as follows:

Raymond J. Dowd, Esq.
Dunnington Bartholow & Miller LLP
1359 Broadway, Suite 600
New York, New York 10018
(E): rdowd@dunnington.com

Nathaniel Christian
535 West 23rd Street
North Penthouse 1D
New York, New York 10011
(E): nc@nathanielchristian.com

- BY MAIL:** I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid Santa Ana, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after date of deposit for mailing in the affidavit.
- BY ELECTRONIC MAIL:** I prepared and transmitted an e-mail on this date to the e-mail address(es) listed above with the above-referenced documents attached thereto in electronic format.
- BY OVERNIGHT COURIER:** I caused such envelope to be placed for collection and delivery on this date in accordance with standard OVERNITE EXPRESS delivery procedures.
- BY PERSONAL SERVICE:** I caused such envelope to be delivered by hand to the above-referenced person(s).
- I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 19, 2009, at Santa Ana, California.



Brian P. Kinder, Esq.